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September 9, 2021

VIA ELECTRONIC FILING AND U.S. MAIL

Will Seuffert
Executive Secretary
Minnesota Public Utilities Commission
350 Metro Square Building
121 Seventh Place East
St. Paul, MN 55101

Re: *In the Matter of Minnesota Power's Petition for Interpretation of Terms and Conditions of Service to Verso Minnesota Wisconsin LLC*
MPUC Docket No. E015/M-21-593

Dear Mr. Seuffert:

Enclosed for filing with the Minnesota Public Utilities Commission please find Minnesota Power's **REPLY COMMENTS** in the above-captioned matter.

By copy of this letter, I am providing service to those listed on the Official Service List on file with the Commission. If you have any questions, please feel free to contact me.

Yours truly,

David R. Moeller

Enclosure
cc: Attached Service List

STATE OF MINNESOTA
BEFORE THE
MINNESOTA PUBLIC UTILITIES COMMISSION

Docket No. E015/M-21-593

In the Matter of Petition for Interpretation
of Terms and Conditions of Service to
Verso Minnesota Wisconsin LLC

REPLY COMMENTS

INTRODUCTION

Minnesota Power (or, the “Company”) respectfully submits this Reply to the Comments submitted by Verso Minnesota Wisconsin LLC (“Verso”) and the Large Power Intervenors (“LPI”). Minnesota Power agrees with the well-reasoned and -supported Comments submitted by the Department of Commerce, Division of Energy Resources (“Department”), and, as a result, does not specifically address those Comments in this Reply.

Verso claims that the Commission has already determined that Minnesota Power has a duty to mitigate damages under the Electric Service Agreement (“ESA”) between Minnesota Power and Verso. In doing so, however, Verso significantly misconstrues the Commission’s 2012 Order approving the 2012 Amendment to the ESA. Specifically, Verso claims that the Commission adopted the findings of the Department in that proceeding, which created a duty for the Company to mitigate its damages. Neither of those assertions are true. The Commission adopted only the Department’s recommendations, not its findings. Additionally, as confirmed by the Department’s Comments in this proceeding, the Department’s reference to mitigation referred not to any duty to mitigate for the benefit of Verso, but rather to an opportunity for Minnesota Power to mitigate damages to other customers in the event Verso closed the Duluth Mills.

Verso's other arguments regarding the amounts Minnesota Power should recover, good faith and fair dealing, and the enforceability of ESA provisions are outside of the scope of this proceeding. Minnesota Power has requested only an interpretation of the terms of the ESA, and explicitly acknowledged that it does not seek a determination of damages or enforcement of the ESA. Even if these issues are relevant, Verso's arguments fail to establish that it is no longer obligated to honor the terms of the ESA.

LPI's Comments question the Commission's jurisdiction to interpret the ESA. LPI's position relies upon its assertion that the ESA is merely a contract that should be interpreted by the courts rather than a tariff within the Commission's jurisdiction. It has been unquestionably established, however, that large power ESAs are part of Minnesota Power's filed rates, over which the Commission has plenary jurisdiction.

Alternatively, LPI seeks to defer the Commission's interpretation of the ESA to the Company's next rate case. However, all decisions with rate case implications need not be made solely during a rate case. None of the parties to the ESA have sought additional record development, and there is an active disagreement as to the interpretation of the ESA that is ripe for Commission resolution. Simply put, there is no valid reason to delay.

DISCUSSION

I. Reply to Verso's Comments

A. The Commission Has Not Ordered Minnesota Power to Mitigate Damages for the Benefit of Verso

Verso claims that the Commission's Order ("2012 Order) approving the 2012 Amendment requires Minnesota Power to mitigate its damages for the benefit of Verso. In doing so, Verso grossly mischaracterizes the 2012 Order and the Department's comments in that proceeding.

Verso misconstrues the Department's Comments, which Verso claims the Commission incorporated in the 2012 Order. A plain reading of the 2012 Order and the associated filings in that docket demonstrate that the Department was concerned with the 2012 Amendment providing Minnesota Power a reasonable opportunity to mitigate against the loss of Verso's load for the protection of all of the Company's other customers, and not with establishing a contractual duty that Minnesota Power mitigate damages for the benefit of Verso. Thus, Verso attempts to conflate the Department's purpose of providing an opportunity to mitigate for the benefit of all other customers with a duty to mitigate to reduce amounts owed by Verso.

Prior to the 2012 Amendment, Verso could terminate only after providing four years advance notice, during which time it would still be responsible for paying for Contract Demand.¹ Minnesota Power agreed to the 2012 Amendment in order to provide Verso's predecessor with more flexibility and a reduction in risk to assist it in emerging from Chapter 11 bankruptcy.² One of the significant concessions Minnesota Power provided Verso was the addition of Paragraph 3(N), which allowed Verso to reduce the amount of time it would have to pay for the minimum Contract Demand from four years to two years after providing the Company with notice.³ Minnesota Power explained new Paragraph 3(N) as follows: "In the extreme event that the Duluth Mills are permanently shutdown, [Verso's] Service Requirement is reduced to 0 kW only after at least two years advance notice."⁴

The Department's 2012 Comments indicated that the 2012 Amendment should only be approved if it is in the public interest, which includes ensuring that "[Minnesota Power's] other

¹ Exhibit B, 2005 ESA Paragraphs 2, 3(A) and (B).

² *In the Matter of Minnesota Power's Petition for Approval of an Amendment to an Electric Service Agreement with NewPage Wisconsin System, Inc.*, Docket No. E-015/M-12-1025, PETITION at 2 (Sep. 25, 2012).

³ *Id.*

⁴ *Id.* at 8.

ratepayers must not be negatively affected by the Amended Agreement.”⁵ The Department concluded that Verso’s “rates include contribution to [Minnesota Power’s] fixed costs,” and, as a result, the Company’s “ratepayers benefit from such a contribution that would otherwise have to be collected from them.”⁶

With this context in mind, the Department examined whether new Paragraph 3(N) would be in the public interest. The Department first agreed with Minnesota Power’s interpretation of Paragraph 3(N), stating, “Upon at least two years advance notice, in a case of a permanent cessation of operations [Verso] would have the right to reduce its Minimum Firm Demand to 0 kW.”⁷ The Department then concluded, “the two-year advance notice is a sufficient time period to allow [Minnesota Power] to take any necessary steps to mitigate the impact of losing significant load on its system.”⁸

The Department’s concern was whether the reduction of the four-year termination notice requirement to a two-year notice requirement would still provide the Company with sufficient opportunity to mitigate the loss of Verso’s load so that the associated costs need not be allocated to all other customers. Contrary to Verso’s suggested interpretation, the Department’s 2012 Comments neither expressly nor impliedly sought to establish a duty that Minnesota Power must mitigate its losses for the benefit of Verso. Notably, the Department expressly disagrees with Verso’s strained interpretation of the Department’s 2012 Comments, stating “While the Department did mention mitigation, such mitigation was regarding MP taking necessary steps to

⁵ *In the Matter of Minnesota Power’s Petition for Approval of an Amendment to an Electric Service Agreement with NewPage Wisconsin System, Inc., Docket No. E-015/M-12-1025*, COMMENTS OF THE DEPARTMENT OF COMMERCE, DIVISION OF ENERGY RESOURCES at 3 (Oct. 16, 2012) (emphasis added).

⁶ *Id.* at 5.

⁷ *Id.* (emphasis added).

⁸ *Id.*

mitigate the impact of losing significant load on its system, in other words to protect remaining customers on MP's system."⁹ This is further confirmed by the Department's conclusion that Verso is responsible for making all minimum Contract Demand payments for two years after providing notice, and that Minnesota Power has no duty to mitigate its losses during this time.¹⁰

In addition to misconstruing the Department's 2012 Comments, Verso also misrepresents the Commission's 2012 Order. Verso claims that the Commission "adopted the findings and recommendations of the [Department.]"¹¹ However, the 2012 Order states that the "Commission agrees with and adopts the recommendations, of the Department of Commerce, which are attached and hereby incorporated into the Order."¹² Further, the "Commission makes no specific findings regarding the benefits of this agreement to other customers."¹³ These unambiguous statements indicate that the Commission adopted only the Department's "recommendations," which were included in separate sections at the very end of the Department's 2012 Comments and 2012 Response Comments that were attached to the 2012 Order. Contrary to Verso's assertion, the Commission did not adopt the Department's findings, which is where the mitigation statement is located.

In sum, Verso has cherry picked an out of context statement from the findings in the Department's 2012 Comments to support its position. Under even minor scrutiny, however, it is clear that the Department did not intend for its mitigation statement to create a duty for the benefit of Verso, but rather was intended to address whether shortening Verso's effective notice period from four years to two years would adversely affect other customers or Minnesota Power. In any

⁹ Department's Comments at 9.

¹⁰ See Department's Comments.

¹¹ Verso Comments at 2 (emphasis added).

¹² *In the Matter of Minnesota Power's Petition for Approval of an Amendment to an Electric Service Agreement with NewPage Wisconsin System, Inc.*, Docket No. E-015/M-12-1025, ORDER at 1 (Dec. 10, 2012) (emphasis added).

¹³ *Id.*

event, the Commission did not adopt the Department's findings, where the mitigation statement was made. Ultimately, the 2012 Order does not impose a duty on Minnesota Power to mitigate its losses for the benefit of Verso upon the closure of the Duluth Mills.

B. Minnesota Power Is Not Double Recovering

Verso asserts that Minnesota Power would double recover if Verso is forced to honor its contractual commitments because the Company has entered into discussions for a new electric service agreement with ST Paper, the company that purchased the Duluth Mills from Verso.¹⁴

Notwithstanding the merits of this argument, Minnesota Power has only asked the Commission to interpret the ESA to determine whether it includes a duty to mitigate after Verso provided notice of termination. The Company has not requested that the Commission consider any factual disputes between the parties relating to the appropriate amount of damages. As a result, Verso's arguments about double recovery are irrelevant to the immediate proceeding, and the Commission need not address them in its decision.

To the extent that the Commission does consider this issue, Verso's position fails for multiple reasons. First, Minnesota Power is not double recovering. Verso entered into an ESA that explicitly required it to make minimum Contract Demand payments for two years after providing Minnesota Power with notice of its intent to close the Duluth Mills. This agreement was negotiated at arm's length between two sophisticated parties, and the two-year notice requirement was a reduction from the ESA's original four-year notice requirement. Minnesota Power agreed to the reduction because it was trying to help Verso's predecessor successfully emerge from Chapter 11 bankruptcy. Verso now attempts to use Minnesota Power's good deed as an excuse to walk out on its remaining contractual requirements. However, the ESA is clear

¹⁴ Verso Comments at 5-8.

that Verso must satisfy its contractual burden regardless of whether the Duluth Mills have been sold to another party. It is not “unfair” to require Verso to fulfill its contractually agreed upon, and Commission-approved, responsibilities.

Second, ST Paper is not obligated to make any payments under Verso’s ESA, and Minnesota Power is not collecting any additional revenues from Verso beyond what was contractually agreed upon and approved by the Commission. Large Power ESAs are significant loads on Minnesota Power’s system, and the Company has an obligation to serve all customers. If the protections built into ESAs are not honored by customers, then Minnesota Power has a duty to avail itself of all available pathways to enforce the ESA for the benefit of all customers.

Third, Verso makes assumptions about the ST Paper contract that are simply not true or supported by any evidence. Contrary to Verso’s assertions, Minnesota Power has not executed an ESA for Large Power Service with ST Paper, but has only executed (1) a standard form ESA for Large Light and Power service under Rate Schedule 75 to serve the limited energy usage while ST Paper is working on the conversion of the Duluth Mills to manufacture recycled tissue paper, and (2) a confidential term sheet with ST Paper related to the intent of the parties to enter into an ESA for Large Power Service that would be effective if and when ST Paper completes its conversion of the Duluth Mills and restarts the operation to produce recycled tissue paper.

Verso claims, without evidence, that an agreement with ST Paper will more than fully mitigate Minnesota Power’s damages.¹⁵ That is clearly not the case. ST Paper will not even be fully operational until likely sometime in early 2023,¹⁶ and will only be taking minimal amounts of power until that time. As a result, the revenues collected from ST Paper until Verso may reduce

¹⁵ *Id.* at 2, 4, 9.

¹⁶ <https://www.wpr.org/sale-duluth-mill-points-paper-industry-trends>;
<https://www.duluthnewtribune.com/business/manufacturing/7029501-ST-Paper-moves-ahead-with-plans-to-acquire-convert-Duluths-former-Verso-mill>.

its demand to zero kW on January 29, 2023 will not come close to covering the amounts Verso owes under the ESA. Even after ST Paper is operational, it will be a much less energy intensive operation than Verso as the expected power requirements from the recycled tissue manufacturing operation are anticipated to be a fraction of those used by Verso's more energy intensive groundwood manufacturing process for supercalendared paper. As a result, ST Paper's electric power usage will not come close to replacing the load provided under Verso's ESA.

Fourth, and finally, Minnesota Power may not amend the ESA to waive Verso's two-year payment obligations or any other any other provision of the ESA without first receiving approval from the Commission because the relief Verso is requesting is contrary to the plain, Commission-approved language of the ESA.¹⁷ The Company has not submitted, and has no plans to submit, a request that the Commission release Verso from its payment obligations given the adverse consequences that such an action would have on other ratepayers.

C. Minnesota Power Acted in Good Faith

Verso avers that Minnesota Power acted in bad faith by withholding its consent for Verso to assign its ESA to ST Paper, which could have prevented the sale of the Duluth Mills. This is pure conjecture and lacks any basis in fact or reality. Additionally, as discussed above, Minnesota Power has not requested that the Commission determine any factual disputes such as whether the parties acted in good faith. As a result, this argument need not be addressed by the Commission. Even if the Commission does address this issue, Minnesota Power acted in good faith in the best interest of all of its customers.

¹⁷ Minn. Stat. §§ 216B.03, 216B.04, 216B.05, subd. 2a, 216B.07, 216B.16, and 216B.25; *see also In the Matter of Minnesota Power's Petition in Response to the Minnesota Public Utility Commission's Sept. 5, 2008 Order in Docket No. E-015/M-08-321, Docket No. E-015/M-08-1344, ORDER ACCEPTING PETITION, MODIFYING ELECTRIC SERVICE AGREEMENT PROCEDURES, AND CLOSING DOCKET NO. E-015/M-08-321 (Feb. 26, 2009).*

Verso argues that Paragraph 4(C) prohibits a party from unreasonably withholding its consent to the assignment of the ESA. As a primary matter, there was no ESA to assign because Verso had indisputably provided notice of termination and intent to reduce demand to zero kW to Minnesota Power. Once notice had been given, Paragraph 3(N) afforded Minnesota Power sole discretion whether to permit Verso's request to rescind the notice, without any requirement that the Company provide a reason for its decision, much less that it must be deemed "reasonable" by Verso.¹⁸ As a result, Minnesota Power was fully within its rights to reject Verso's request to rescind its notice. Since there was no valid ESA to assign, Minnesota Power did not unreasonably withhold consent to an assignment.

Regardless of the absence of a reasonableness requirement for Minnesota Power's decision to reject Verso's rescission request, Minnesota Power acted in good faith for the benefit of all of its customers. It would have been fiscally irresponsible to release Verso from its contractually mandated payments in favor of a potential new operation that would present the risks of a new market entrant that does not anticipate running the facility during the time period for which Verso is required to make payments under the permanent closure provision of its ESA. The Company's refusal to accept rescission was reasonable on that basis alone.

Additionally, ST Paper never indicated to Minnesota Power that it wanted to assume Verso's ESA. To the contrary, ST Paper indicated to the Company that its operations would be far less energy intensive than Verso's, so it would need to enter into an ESA with significantly lower "take" terms than Verso's ESA. Additionally, ST Paper especially did not want to make the minimum Contract Demand payments under the "pay" provision of Verso's ESA while it used

¹⁸ Exhibit C, 2012 ESA Amendment at 3.

relatively small amounts of energy during the reconfiguration of the Duluth Mills over a planned two year period.¹⁹

Other than making unsupported claims, Verso provided Minnesota Power with zero evidence that ST Paper would have assumed the ESA. Typically, when a purchasing company is willing to assume the ESA of the existing tenant, the Company is provided with some sort of written or verbal statement to that effect from the acquiring party. Verso never provided anything like that in this case, and ST Paper never provided notice to Minnesota Power that it wanted to assume Verso's ESA. As a result, Minnesota Power reasonably concluded that ST Paper was not seeking to assume the ESA, but rather that Verso wanted to rescind its notice in an effort to force assignment of the ESA as a condition of the sale in order to avoid its remaining minimum payment obligations. In that context, Minnesota Power's actions likely encouraged the ultimate sale of the Duluth Mills as ST Paper may not have been willing to purchase the facility if assumption of the ESA was required. The actual sale of the Duluth Mills to ST Paper is a good indicator that Minnesota Power's actions did not threaten the deal or the future operations of the facility, as Verso pontificates, but rather helped pave the way for the deal to be completed.

Finally, seeking to hold Verso to the letter of the contract that it agreed to, and that the Commission approved, cannot be considered afoul of any good faith and fair dealing obligation. If anything, the exact opposite is true. Verso seeks to walk away from contractually agreed upon payments that Minnesota Power relied upon in providing Verso with lower rates than would have been required if Verso had retained the ability to immediately close the plant with no ongoing obligations. Verso's ongoing payment obligations are not in exchange for "nothing," as it claims,

¹⁹ https://www.duluthnewtribune.com/business/manufacturing/7185904-Minnesota-approves-1.3-million-to-restart-idled-Duluth-paper-mill-promising-at-least-80-jobs?utm_medium=email&utm_source=newsletter&utm_campaign=dailypm&utm_content=500020.

but rather represent duly owed consideration for the lower rates and terms Verso enjoyed due to its promise to make at least two years of minimum payments even if it shut down the Duluth Mills.

D. Requiring Payment from Verso under the ESA Would Not Amount to an Unenforceable Penalty

Minnesota Power has not asked the Commission to determine the legal enforceability of the ESA, but rather merely to provide an interpretation of the terms of the ESA as approved by the Commission. The Company believes that the proper venue for enforcement of the ESA is in court, but before such a proceeding can take place the parties need the Commission's interpretation of what was intended by the ESA in the first place. That decision is squarely within the jurisdiction and expertise of the Commission.

Verso first asserts that the ESA "take or pay" agreement is not enforceable because it does not offer "two viable performance options (take or pay)."²⁰ But that is exactly what the ESA provides. Verso has always had the option to either take an amount of energy above the contractual minimum demand, or pay for the contractual minimum demand. In fact, after Verso idled the Duluth Mills in the summer of 2020 it continued to make payments under the "pay" provision after having elected to use the "take" option while the facility was running. That Verso decided to sell the plant merely means that it, not Minnesota Power, elected to no longer take any energy going forward. Verso cannot by its own actions eliminate one of its options and then assert that the lack of that option going forward renders the contract unenforceable.

Verso also asserts that the ongoing payment obligation in the ESA constitutes an unreasonable penalty. This argument also lacks any support. In negotiating the ESA, Minnesota Power and Verso allocated risks in a way that reduced the upfront and ongoing payment requirements Verso would have had to make under the contract by extending a minimum payment

²⁰ Verso Comments at 10.

amount for a set period after providing notice of termination. Both parties relied upon that risk allocation in entering into the ESA. Now that Verso has received all of the benefits of that risk allocation, it attempts to characterize its remaining bargained for obligations as an unenforceable penalty.

In any event, the “pay” provision is not an actual penalty that is triggered upon breach of the ESA, but rather is one of the two alternative payment regimes available while the contract is in effect.²¹ When Verso elected not to “take” energy under the ESA, then it elected to “pay” for the minimum Contract Demand required by the contract until the ESA is terminated. Verso did not breach the contract by electing to “pay” when it shut down the Duluth Mills in the summer of 2020, it merely chose one of the two available payment regimes. Not until Verso refused to make its contractually obligated payments under the “pay” regime did it breach the ESA. At that time, Minnesota Power sought to enforce its contractual right to the amounts due under the “pay” regime, which does not constitute a penalty.

Notably, Verso has not identified a single case wherein a “take or pay” energy contract has been invalidated for the reasons it currently argues. As discussed in Minnesota Power’s Petition, multiple courts across the country have confirmed the enforceability of energy sector take or pay contracts negotiated at arms-length among sophisticated parties, and described why continuing

²¹ *Digital Ally, Inc. v. Z3 Technology, LLC*, 754 F.3d 802, 815-16 (10th Cir. 2014) (“A take-or-pay provision is thus different from an obligation combined with a liquidated damages provision: the ‘pay’ option of a take-or-pay contract is a valid alternative for the buyer to perform under the contract, rather than a measure of damages for breach of a purchase obligation. However, where a buyer breaches a take-or-pay contract, the ‘pay’ option will frequently serve as an appropriate measure of damages[.]”) (citing *Prenalta Corp. v. Colorado Interstate Gas Co.*, 944 F.2d 677, 689 (10th Cir. 1991)).

“pay” obligations after a plant is shut down or sold are not unenforceable penalties.²² Ultimately, there can be no doubt that the Commission-approved payment provisions that Verso willingly entered into and benefited from are enforceable.

II. Reply to LPI’s Comments

A. The Commission Has Jurisdiction Over Interpretation of the ESA

LPI attempts to re-characterize Minnesota Power’s Petition as substantively equivalent to a claim under the Declaratory Judgment Act (“DJA”), which does not confer authority upon the Commission to issue declaratory relief.²³ However, Minnesota Power is not seeking relief under the DJA, and the DJA does not establish the courts as the sole venue for providing contractual interpretation. Specifically, the Commission has authority to interpret the tariffs (including Large Power ESAs) over which it has jurisdiction, and is the preferred venue when interpretation would require the construction of technical terms and the exercise of administrative discretion.²⁴

LPI argues that courts are the proper venue for this proceeding since “the Company seeks to enforce the terms of the ESA that are subject to a contract dispute between the utility and a specific customer (*i.e.*, not related to Minnesota Power’s rates).”²⁵ However, LPI refuses to recognize that ESAs are part of Minnesota Power’s tariffs for purposes of Minn. Stat. § 216B.05 and are part of the Company’s rate book. This was made crystal clear by the Commission in its March 2, 2009 Order that concluded, “The Commission’s statutory authority over the review of

²² See, e.g., *World Fuel Servs., Inc. v. John E. Retzner Oil Co., Inc.*, 234 F. Supp. 3d 1234, 1241 (S.D. Fla. 2017) (“Breach of a take or pay agreement entitles the non-breaching party to payments it would have received under the contract with no duty to mitigate damages.”); *City of Memphis, Tenn., for & on Behalf of Memphis Light, Gas & Water Div. v. Ford Motor Co.*, 304 F.2d 845, 851 (6th Cir. 1962) (holding that that Ford Motor Co. owed the power company the full minimum amounts specified in its power agreement despite its cessation of operations and the subsequent sale of the plant to another power customer).

²³ LPI Comments at 2-3.

²⁴ *Hoffman v. N. States Power Co.*, 764 N.W.2d 34, 49 (Minn. 2009).

²⁵ LPI Comments at 6.

electric service agreements is plenary, and encompasses the entirety of the Minnesota Public Utilities Act...”²⁶ Notably, in that proceeding LPI provided comments that are directly contrary to its current position, stating, “LPI believes that there is ample Commission precedent that ESAs are themselves tariffs and that the Commission's authority over them is plenary. We would assert that, at a minimum, the Commission's power to review ESAs is conveyed by Minn. Stat. §§ 216B.03, 216B.04, 216B.07, and 216B.16.”²⁷ To the extent that LPI now disagrees with the 2009 Order and its own comments in that proceeding, it should file a separate petition because that issue is outside of the scope of Minnesota Power’s Petition in this proceeding.

As the Verso ESA is part of Minnesota Power’s rates, the filed rate doctrine prohibits courts from evaluating the reasonableness of the approved tariff. As the Minnesota Supreme Court explained in *Hoffman*,

The MPUC further enjoys broad power to “ascertain and fix just and reasonable” policies for all public utilities. Minn.Stat. § 216B.09, subs. 1 & 2 (2008). The MPUC actively regulates rate reasonableness, Minn.Stat. § 216B.16 (2008), and may adjust rates according to its own investigations and judgment, Minn.Stat. § 216B.23 (2008). Allowing courts to examine a utility rate structure that has been approved by the MPUC would infringe upon the authority delegated by the legislature to the MPUC, and would therefore run afoul of the filed rate doctrine.²⁸

The determination of what rates Verso owes under the ESA falls squarely within the jurisdiction of the Commission. That is exactly what Minnesota Power has asked the Commission to do in this proceeding.

²⁶ *In the Matter of Minnesota Power’s Petition in Response to the Minnesota Public Utility Commission’s Sept. 5, 2008 Order in Docket No. E-015/M-08-321*, Docket No. E-015/M-08-1344, ORDER – CORRECTED – ACCEPTING PETITION, MODIFYING ELECTRIC SERVICE AGREEMENT PROCEDURES, AND CLOSING DOCKET NO. E-015/M-08-321 at 6 (Mar. 2, 2009).

²⁷ *Id.*, LARGE POWER INTERVENOR GROUP’S REPLY COMMENTS at 2.

²⁸ *Hoffman v. N. States Power Co.*, 764 N.W.2d 34, 43 (Minn. 2009).

Even if courts are not barred from evaluating the Verso ESA under the filed rate doctrine, the interpretation of the terms of the ESA should first be addressed by the Commission pursuant to the primary jurisdiction doctrine. As *Hoffman* instructs, courts should defer to the Commission the examination of any tariff terms that are open to interpretation, and that would benefit from the Commission's expertise regarding technical terms, industry practices, policy matters, and the public interest.²⁹ The Commission, as the agency that originally evaluated and approved the Verso ESA, is in the best position to determine the meaning and application of the ESA's terms.

While courts have jurisdiction and authority to enforce the plain language of an existing tariff,³⁰ the parties in this proceeding disagree about the interpretation of Verso's payment obligations under the ESA. As a result, obtaining the Commission's determination regarding the meaning of the terms of the ESA will provide the clarity needed if either Minnesota Power or Verso elects to seek judicial enforcement of the ESA following the outcome of this proceeding.

Ultimately, the Commission has independent plenary jurisdiction over review of ESAs, including "a present and continuing authority to review such agreements, both before and after the Commission's initial action on the agreement."³¹ Thus, the Commission possesses the jurisdictional authority to construe the terms of the Verso ESA.

B. Minnesota Power Does Not Request that the Commission Award Damages

LPI argues that Minnesota Power is asking the Commission to award damages, which is outside of its authority. Essentially, LPI asserts that if the Commission agrees with Minnesota

²⁹ *Id.* at 48-51.

³⁰ *Id.* at 43-44.

³¹ *In the Matter of Minnesota Power's Petition in Response to the Minnesota Public Utility Commission's Sept. 5, 2008 Order in Docket No. E-015/M-08-321*, Docket No. E-015/M-08-1344, ORDER – CORRECTED – ACCEPTING PETITION, MODIFYING ELECTRIC SERVICE AGREEMENT PROCEDURES, AND CLOSING DOCKET NO. E-015/M-08-321 (Mar. 2, 2009).

Power's interpretation of the ESA, then Verso will be obligated to pay amounts due that can be derived from the ESA. But this argument is nonsensical.

LPI surmises that if the Commission clarifies the interpretation and application of the ESA's payment terms in favor of Minnesota Power, it will effectively be awarding damages. However, any time the Commission makes a determination regarding the interpretation or reasonableness of rates it is establishing amounts that customers are obligated to pay under a tariff. Thus, the act of establishing or interpreting rates alone does not come close to constituting the award of damages. LPI's attempt to conflate the setting of rates with the awarding of damages should be rejected.

C. Deferral to the Rate Case Is Unnecessary

LPI argues that the Commission should defer resolution of the Verso ESA interpretation until the Company's next rate case because the outcome could have rate case implications. But there is no standard requiring that all decisions with rate case implications be made only in a rate case. Indeed, no decisions of any financial or operational import could be made by the Commission outside of a rate case under LPI's reasoning.

While the loss of Verso revenue will be a significant driver in the upcoming rate case, there is no reason why the Commission should delay resolution of an existing dispute between the parties regarding the interpretation of the ESA. Nothing about the rate case proceeding would make it a more appropriate avenue for contract interpretation, especially since none of the parties to the contract have asserted that additional record development is needed. This would also require Verso to engage in a general rate case when it has repeatedly demonstrated it no longer wants to engage with Minnesota Power or the Commission.

Historically, Large Power ESAs have been beneficial to all customers through fixed cost recovery. If Large Power customers like Verso are allowed to walk away from these commitments,

then all Minnesota Power customers will need to pay higher rates to account for these lost contributions to fixed cost recovery.

CONCLUSION

The Commission has plenary jurisdiction over the ESA, which is included in Minnesota Power's tariffs. The ESA unambiguously states that "in no event" shall Verso's obligation to make Minimum Firm Demand payments be reduced prior to two years after Verso provides notice of intent to reduce demand to zero kW. Neither the ESA nor Commission precedent require Minnesota Power to mitigate damages under the ESA. Accordingly, Minnesota Power respectfully requests that the Commission interpret the ESA to require Verso to fulfill its bargained-for take or pay obligations, and clarify that Minnesota Power does not have a duty to mitigate damages under the ESA.

September 9, 2021

Respectfully submitted,

MINNESOTA POWER



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IN THE MATTER OF THE PETITION FOR
INTERPRETATION OF TERMS AND CONDITIONS
OF SERVICE TO VERSO MINNESOTA WISCONSIN
LLC

MPUC DOCKET NUMBER: E015/M-21-593

CERTIFICATE OF SERVICE

Jill N. Yeaman certifies that on the 9th day of September, 2021, she efiled a true and correct copy of Minnesota Power's **REPLY COMMENTS** by posting the same on eDockets (www.edockets.state.mn.us). Said document was also served via U.S. Mail or email as designated on the Official Service List on file with the Minnesota Public Utilities Commission in the above-referenced docket.

/s/ Jill N. Yeaman

Jill N. Yeaman

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Generic Notice	Commerce Attorneys	commerce.attorneys@ag.state.mn.us	Office of the Attorney General-DOC	445 Minnesota Street Suite 1400 St. Paul, MN 55101	Electronic Service	Yes	OFF_SL_21-593_M-21-593
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First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Generic Notice	Residential Utilities Division	residential.utilities@ag.state.mn.us	Office of the Attorney General-RUD	1400 BRM Tower 445 Minnesota St St. Paul, MN 551012131	Electronic Service	Yes	OFF_SL_21-593_M-21-593
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